

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL ALLEN WATTS,

Defendant-Appellant.

UNPUBLISHED

March 27, 2012

No. 301371

Oakland Circuit Court

LC No. 2010-232734-FH

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Defendant Carl Allen Watts appeals as of right his jury-trial convictions of three counts of third-degree criminal sexual conduct (person at least 13 and under 16 years of age), MCL 750.520d(1)(a). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 20 to 60 years' imprisonment for each third-degree criminal sexual conduct conviction, with the sentences to run concurrently. We affirm.

This case arises from allegations made by CM that she and defendant engaged in various sex acts between October 2007 and March 2008 when she was 15 years old. CM and defendant's daughter were in the same class at school. CM met defendant during a school field trip when she was ten years old. Three years later, CM became very close with defendant's family and spent a lot of time at defendant's home. Defendant began to treat CM as a member of his family. In the spring of 2007, defendant began making sexual remarks to CM, followed by acts of sexual touching in July 2007. By the time CM was 15 years old, the sexual acts progressed to digital, vaginal, and anal penetration. Although CM initially told a Michigan State Police trooper in 2007 that she did not have sexual contact with defendant, CM eventually reported the sexual contact to the police in the spring of 2010.

I. ADMISSION OF OTHER ACTS PURSUANT TO MCL 768.27a

Defendant first argues that the trial court abused its discretion when it allowed the prosecutor to admit evidence of three of defendant's other sexual acts with CM pursuant to MCL 768.27a without assessing the relevance of the acts, determining whether they were unduly prejudicial under MRE 403, and requiring the prosecutor to specify which three of the 20 acts identified in the motion to introduce other listed offenses the prosecutor intended to use at trial.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or it makes an error of law. *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010). This Court reviews de novo whether a rule or statute precludes admission of evidence as a matter of law. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

MCL 768.27a provides, in pertinent part:

(1) Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

Thus, under MCL 768.27a, evidence of a defendant's other acts may be admitted if the defendant is accused of committing a listed offense against a minor and the other acts are relevant for any purpose. *People v Watkins*, 277 Mich App 358, 364; 745 NW2d 149 (2007), lv gtd after rem 489 Mich 863 (2011). The statute permits the introduction of evidence that previously would have been inadmissible as "it allows what may have been categorized as propensity evidence to be admitted" *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). It also "reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords." *Id.* at 620. Having a complete picture of a defendant's history can shed light on the likelihood that a given crime was committed. *Id.* However, the trial court must still determine whether evidence that is admissible under MCL 768.27a should nevertheless be excluded pursuant to MRE 403 because its probative value is substantially outweighed by the danger of unfair prejudice.¹ *Id.* at 620-621.

In both the prosecutor's notice of intent to introduce evidence of defendant's other listed offenses pursuant to MCL 768.27a and her subsequent motion, the prosecutor listed and sought to introduce 14 separate acts involving CM.² At the September 22, 2010, motion hearing, the

¹ MRE 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

² In his appellate brief, defendant contends that *Pattison* appears to limit application of MCL 768.27a to uncharged sexual offenses toward minors *other than* the complainant. We find

trial court surmised that the list actually entailed “at least 15, and probably more like 20” different acts. The other-acts evidence listed in the prosecutor’s motion included instances in which defendant and CM engaged in sexual acts when CM was between the ages of 15 and 17. The trial court noted that the introduction of *all* of defendant’s other acts could be unduly prejudicial, so it limited the quantity of other-acts evidence and allowed the prosecutor to select and admit three of the acts listed in her motion. It did not, however, require the prosecutor to specify which three she intended to introduce.

We cannot conclude that the trial court abused its discretion by permitting the prosecutor to admit three of the acts listed in her motion. All of the other-acts evidence listed in the prosecutor’s motion were relevant to prove defendant’s propensity to commit the charged offenses. The evidence was also relevant to shed light on defendant’s grooming history and the progression of defendant’s sexual relationship with CM, and, as such, it bolstered CM’s credibility. See *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010). The probative value of three of the other acts was not substantially outweighed by the danger of unfair prejudice. The introduction of three other acts was probative of defendant’s state of mind and intent in committing the charged crimes. In addition, the evidence bolstered CM’s credibility and discredited defendant’s testimony and defense theory, i.e., that the sexual contact occurred only after CM reached the age of majority. Moreover, by limiting the introduction of defendant’s other acts to three, the trial court avoided the presentation of excessive evidence of other uncharged acts committed by defendant against CM, thereby decreasing the potential for unfair prejudice. Of course, all relevant evidence is prejudicial and damaging to some extent; however, the probative value of the admission of three other acts was not substantially outweighed by the danger for unfair prejudice. Furthermore, although defendant did not know which three of the listed other acts the prosecutor would introduce at trial, defendant had ample notice of the evidence that the prosecutor sought to introduce. Defendant cannot claim that he was somehow surprised by the three specific other acts that the prosecutor introduced or that he was unprepared to meet the evidence.

Defendant also contends that the prosecutor elicited testimony regarding more than three of the listed other acts and, thus, that the trial court abused its discretion by not limiting the prosecutor’s admission of the other-acts evidence. We review this unpreserved issue for plain error affecting defendant’s substantial rights. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003) (an objection on one ground is insufficient to preserve an appellate attack on a different ground). The record reveals that the prosecutor elicited testimony from CM during direct examination regarding only three of the listed other acts. During cross-examination, CM clarified that defendant “dry-humped” her and kissed her in July 2007 and not August 2007. Defense counsel then asked: “Did anything happen in-in August?” CM responded, “Oh, yes,” and defense counsel quickly moved on. On redirect examination, the prosecutor asked CM what was taking place in August of 2007. CM explained that she and defendant engaged in vaginal, anal, and oral sex during August of 2007. The prosecutor argues that defense counsel “opened the door to this testimony” and that CM was allowed to explain her answer. This Court has held that “[a] witness should be allowed to explain an answer elicited on cross-examination.” *People*

defendant’s interpretation of *Pattison* to be faulty and note defendant’s proper concession that the plain language of the statute is not limited in this fashion.

v Bowen, 77 Mich App 684, 689; 259 NW2d 189 (1977). While it is questionable whether the circumstances called for an explanation of CM’s answer as contemplated by *Bowen*, defense counsel did not object, and the trial court twice provided the jury with a cautionary instruction on the proper use of the other-acts evidence. Any prejudice resulting from the other-acts evidence would have been eliminated by the trial court’s limiting instruction to the jury that it could not convict defendant of the crimes charged based on his other acts against CM. See *People v Wacławski*, 286 Mich App 634, 674; 780 NW2d 321 (2009). As the trial court noted, there is “no magic formula” regarding the appropriate number of admissible other acts evidence before undue prejudice arises. Defendant has not demonstrated a plain error affecting his substantial rights with regard to the additional other-acts evidence in this case.

II. CONSTITUTIONALITY OF MCL 768.27a

Defendant argues that MCL 768.27a is unconstitutional and violates the separation of powers because it infringes on the Michigan Supreme Court’s exclusive authority to prescribe rules governing court practice and procedure.³ This Court considered and rejected this same argument in *Pattison*, 276 Mich App at 619-620. In *Pattison*, this Court determined that, while the Legislature may not enact a rule that is purely procedural, MCL 768.27a is a “substantive rule of evidence because it does not principally regulate the operation or administration of the courts” and, therefore, “does not violate the principles of separation of powers.” *Id.* Also, this Court has held that, to the extent MCL 768.27a conflicts with MRE 404(b), MCL 768.27a controls over MRE 404(b) because the statute addresses an area of substantive law. *Watkins*, 277 Mich App at 362-364. Accordingly, we conclude that defendant’s constitutional claim lacks legal merit because both the doctrine of stare decisis and the Michigan Court Rules require this Court to adhere to *Pattison*’s analysis on this issue. See MCR 7.215(C)(2), (J)(1).

Affirmed.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher

³ We note that the Michigan Supreme Court has granted leave to decide whether MCL 768.27a and MRE 404(b) conflict and, if so, whether the statute or the rule of evidence controls, and whether the statute’s failure to require that evidence admitted under the statute comply with MRE 403 violates a defendant’s constitutional due process right to a fair trial. See *People v Watkins*, 489 Mich 863; 795 NW2d 147 (2011); *People v Pullen*, 489 Mich 864; 795 NW2d 147 (2011).